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ORIENTAL BANK BHD

v.

NORDIN HAMID & ORS

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HISHAMUDIN MOHD YUNUS JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-1259-2005]

C

4 APRIL 2011

LEGAL PROFESSION: *Practice of law - Partnerships between solicitors - Dishonesty of one partner - Legal firm appointed by bank to carry out foreclosure proceedings - Proceeds of foreclosure wrongly withheld by legal firm - Firm liable to handover foreclosure proceeds to bank - Whether all partners of firm jointly and severally liable to bank - Whether new partner jointly liable to bank - Partnership Act 1961, ss. 11, 13 & 14*

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PARTNERSHIP: *Liabilities of partners - Debts and obligations - Legal firm appointed by bank to carry out foreclosure proceedings - Proceeds of foreclosure wrongly withheld by legal firm - Firm liable to handover foreclosure proceeds to bank - Whether all partners of firm jointly and severally liable to bank - Whether receipt and misapplication of foreclosure proceeds by one partner absolved other partners from liability to make good loss to bank - Whether new partner jointly liable to bank - Demand for debt only made after new partner joining the firm - Partnership Act 1961, ss. 11, 13, 14*

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RESTITUTION: *Money had and received - Unjust enrichment at plaintiff's expense - Legal firm appointed by bank to carry out foreclosure proceedings - Proceeds of foreclosure wrongly withheld by legal firm - Whether bank may claim in restitution against all partners of firm*

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The defendants/respondents were advocates and solicitors and practised as partners under the style of Tetuan Nordin Hamid & Co. ("the firm"). The plaintiff/appellant was their client. The appellant engaged the firm to deal with 3 foreclosure proceedings in respect of three accounts, referred to as "Akaun Faridah", "Akaun Dr. Ariffin" and "Akaun Nik Ahmad". The public auctions were successfully completed and the nett proceeds of the sale at the auctions were paid over to the firm. The firm paid over to the

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appellant the proceeds from the sale at the auction in respect of Akaun Faridah almost two years later. The appellant claimed that the delay in remitting the proceeds of the sale had deprived it of the interest which it could have enjoyed. In relation to Akaun Dr. Ariffin and Akaun Nik Ahmad, the appellant claimed that the proceeds from the auction was not remitted at all to the appellant. The appellant therefore claimed for the auction proceeds and interest thereon. The 4th respondent claimed that he was not a partner in the firm at the material time and therefore was not liable to the appellant. The 2nd and 3rd respondents claimed that the delay in remitting the proceeds of sale in respect of Akaun Faridah was due to the dispute between the appellant and the Firm as to the legal fees claimed by the Firm, which was still not paid and for which they claimed a set off. They claimed that the proceeds of sale in respect of Akaun Dr. Ariffin and Akaun Nik Ahmad were retained by way of solicitors' lien to secure the payment of the disputed fees. The 2nd, 3rd and 4th respondents averred that disciplinary proceedings had been conducted by the disciplinary board under the Legal Profession Act 1976 against them for breach of trust as a result of the appellant's complaint. In those proceedings, the appellant's counsel had conceded that the 2nd, 3rd and 4th respondents did not commit breach of trust. Further, the 1st respondent had admitted during the proceedings that he alone was responsible for the breach of trust. The learned High Court judge found that the appellant did not sue the respondents on the basis of a retainer and therefore focused solely on the issue of breach of trust. He found that the 2nd to 4th respondents were not liable as breach of trust was committed by the 1st respondent alone and they did not participate in nor had any knowledge of the breach of trust until long after the event. He therefore dismissed the appellant's claim. Hence this appeal.

Held (allowing the appeal with costs)
Per Zaharah Ibrahim JCA:

(1) The learned High Court judge erred in his finding that the claim was not based on retainer and was solely based on breach of trust. The basis for the claim was the fact that the appellant had retained the firm to deal with the foreclosure proceedings. The receipt of the auction proceeds was not denied by the respondents. Thus, by virtue of s. 13 of the Partnership Act 1961 ('PA61'), the firm was liable to make

A good the appellant's loss. Consequently, by virtue of s. 14 of PA61 all the partners, including the 2nd to the 4th respondents, were liable jointly and severally to make good the loss. (paras 54-56)

B **(2)** At the time the first written demand was made by the appellant, the 4th respondent was already a partner in the firm. That first written demand gave rise to the debt claimed by the appellant. The 4th appellant was therefore caught by s. 11 of PA61. (para 58)

C **(3)** The money was not entrusted to any particular partner as trustee. It was received by the firm. It is in the context of receiving the money and holding the money on behalf of the appellant with an obligation to hand over the money to the appellant that the "trust" arose. As the money was received D by the firm, the misapplication of the money by the 1st respondent could not absolve the other partners from the liability to make good the loss to the appellant. This is clear from ss. 13 and 14 of PA61. The 2nd to the 4th respondents were therefore jointly and severally liable to return the money E received by the firm. (paras 62 & 63)

Per Hishamudin Mohd Yunus JCA:

(1) The basis of the appellant's claim was the common law of F restitution. It was a claim for money had and received based on the principle of unjust enrichment. The appellant must succeed in its claim for restitution against the second, third and fourth respondents based on the claim for money had and received and the principle of unjust enrichment, as well as G based on s. 11 of PA61. Since the legal obligation to make restitution was that of the legal firm's, therefore every partner of the firm was jointly liable with the other partners to make restitution. (paras 22 & 23)

H **(2)** When the legal firm received the auction monies, the fourth respondent then was not yet a partner of the firm. However, even after the fourth respondent had joined the legal firm on 1 June 1996, the monies were still not handed over to the rightful owner, the appellant; and the monies were still not I remitted to the appellant even after two notices of demand

were issued. Thus, the fourth respondent was still liable in respect of the firm's obligation to make restitution to the appellant by reason of s. 11 of the PA61. (paras 38 & 39)

Obiter:

(1) In relation to the 1st respondent, since he was absent on the first day of the trial, the court entered a 'default judgment' against him. Even though the 1st respondent was absent, the court should have proceeded with the trial, and the court could only give judgment against the first respondent at the conclusion of the trial; and that judgment would have to be given on the merit of the plaintiff's case. There is no such thing as a 'default judgment' by reason of the absence of the 1st respondent. (paras 41 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Defendan-defendan/responden-responden adalah peguambela dan peguamcara yang beramal selaku rakan kongsi di bawah nama Tetuan Nordin Hamid & Co. ("Firma"). Plaintif/perayu adalah anakguam mereka. Perayu melantik Firma untuk mengendalikan tiga prosiding halangtebus dalam tiga akaun yang dirujuk sebagai "Akaun Faridah", "Akaun Dr. Ariffin" dan "Akaun Nik Ahmad". Lelongan awam telah berjaya diadakan dan baki bersih harga jualan telah dibayar kepada Firma. Firma bagaimanapun hanya membayar kepada perayu hasil jualan dari lelongan berkaitan Akaun Faridah kira-kira dua tahun kemudian. Berikutnya, perayu mendakwa bahawa kelewatan memasukkan pembayaran telah menghalangnya dari memanfaati faedah yang boleh diperolehi dari jumlah tersebut. Berhubung Akaun Dr. Ariffin dan Akaun Nik Ahmad, perayu mendakwa bahawa hasil dari lelongan langsung tidak dibayar kepada perayu, dan oleh itu perayu menuntut jumlah dari hasil lelongan tersebut beserta dengan faedahnya. Responden keempat mendakwa bahawa beliau bukan seorang rakan kongsi di dalam Firma dan kerana itu tidak bertanggungan kepada perayu. Responden-responden kedua dan ketiga mendakwa bahawa kelewatan dalam memasukkan hasil jualan berkaitan Akaun Faridah adalah disebabkan oleh pertikaian di antara perayu dan Firma berhubung fi yang dituntut oleh Firma, yang sehingga kini masih belum dibayar dan untuk mana mereka menuntut suatu set-off. Mereka juga mendakwa bahawa hasil jualan bagi Akaun Dr. Ariffin dan Akaun Nik Ahmad telah dipegang berdasarkan lien peguamcara bagi mendapatkan bayaran fi yang dipertikai. Responden-responden

kedua, ketiga dan keempat menyatakan bahawa prosiding disiplin kerana pecah amanah telah dijalankan terhadap mereka oleh Lembaga Disiplin di bawah Akta Profesion Undang-Undang 1976 ekoran aduan yang dibuat oleh perayu. Dan bahawa, di dalam prosiding disiplin tersebut, peguam perayu telah mengakui bahawa responden-responden kedua, ketiga dan keempat telah tidak melakukan apa-apa pecah amanah. Selain itu, di dalam prosiding yang sama, responden pertama telah mengakui bahawa hanya beliau sahaja yang bertanggungjawab atas perbuatan pecah amanah. Yang arif hakim Mahkamah Tinggi mendapati bahawa perayu tidak mendakwa responden-responden berdasarkan kepada retainer dan dengan itu memberi perhatian sepenuhnya kepada isu pecah amanah. Beliau dapati bahawa responden-responden kedua hingga keempat tidak bertanggungan kerana pecah amanah hanya dilakukan oleh responden pertama seorang sahaja dan mereka tidak terlibat dengannya dan tidak juga mengetahui mengenainya sehinggalah beberapa lama kemudian. Yang arif hakim dengan itu menolak tuntutan perayu. Ini adalah rayuan perayu terhadapnya.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zaharah Ibrahim HMR:

(1) Yang arif hakim Mahkamah Tinggi khilaf apabila mendapati bahawa tuntutan tidak didasarkan kepada retainer tetapi bergantung sepenuhnya kepada pecah amanah. Asas tuntutan adalah fakta bahawa perayu telah melantik Firma untuk berurusan dengan prosiding halangtebus. Penerimaan hasil dari lelongan tidak dinafikan oleh responden-responden. Oleh itu, berdasarkan s. 13 Akta Perkongsian 1961 ('AP61'), Firma bertanggungan untuk mengganti kerugian perayu. Begitu juga, berdasarkan s. 14 AP61 kesemua pekongsi termasuk responden-responden kedua, ketiga dan keempat adalah bertanggungan secara bersesama dan berasingan untuk menggantikan kerugian.

(2) Pada masa tuntutan bertulis pertama dibuat oleh perayu, responden keempat sudah menjadi rakan kongsi Firma. Tuntutan bertulis pertama tersebut telah membangkitkan hutang seperti yang dituntut oleh perayu. Maka responden keempat adalah dirangkumi oleh s. 11 AP61.

(3) Wang tidak diamanahkan kepada mana-mana rakan kongsi tertentu selaku pemegang amanah. Ia diterima oleh Firma. Maka dalam konteks menerima wang dan memegangnya bagi pihak perayu dengan tanggungan untuk menyerahkannya kepada perayu inilah berbangkitnya soal "amanah". Oleh kerana wang diterima oleh Firma, maka penyalahgunaannya oleh responden pertama tidak membebaskan pekongsi-pekongsi lain dari tanggungan untuk mengganti kerugian perayu. Ini jelas dari ss. 13 dan 14 AP61. Responden-responden kedua hingga keempat dengan itu adalah bertanggungan secara bersesama dan berasingan untuk mengembalikan wang yang diterima oleh Firma.

Oleh Hishamudin Mohd Yunus HMR (menyetujui):

(1) Asas tuntutan perayu adalah restitusi di sisi undang-undang common. Ia adalah tuntutan untuk wang yang diterima dan dipegang dengan berdasarkan kepada prinsip pengkayaan tidak adil. Perayu seharusnya berjaya dalam tuntutan restitusinya terhadap responden-responden kedua, ketiga dan keempat berdasarkan kepada tuntutan terhadap wang yang diterima dan dipegang dan prinsip pengkayaan tidak adil, serta s. 11 AP61. Oleh kerana obligasi undang-undang untuk melakukan restitusi adalah atas firma undang-undang, maka setiap seorang dari rakan kongsinya adalah secara bersesama dan berasingan bertanggungan untuk membuat restitusi.

(2) Apabila firma undang-undang menerima wang lelongan, responden keempat masih bukan seorang rakan kongsi firma. Namun begitu, walaupun selepas responden keempat memasuki firma undang-undang pada 1 Jun 1996, wang masih belum diserahkan kepada perayu, iaitu pemiliknya yang berhak; dan wang masih tidak diserahkan kepada perayu walaupun setelah dua notis tuntutan baginya dibuat. Oleh itu, responden keempat tetap bertanggungan berkaitan dengan obligasi firma untuk membuat restitusi kepada perayu berdasarkan s. 11 AP61.

Obiter:

(1) Berhubung dengan responden pertama, oleh kerana beliau tidak hadir pada hari pertama perbicaraan, maka mahkamah memasukkan suatu 'penghakiman ingkar' terhadapnya. Walaupun responden pertama tidak hadir, mahkamah sepatutnya meneruskan dengan perbicaraan, dan mahkamah

juga hanya boleh memberikan penghakiman terhadap responden pertama di akhir perbicaraan; dan penghakiman tersebut perlu dibuat berdasarkan merit kes plaintif. Tidak wujud apa yang dipanggil 'penghakiman ingkar' yang bersebabkan oleh ketidakhadiran responden pertama.

Legislation referred to:
Partnership Act 1961, ss. 6, 11, 13, 14, 15
Rules of the High Court 1980, O. 33

Other source(s) referred to:
Goff & Jones on The Law of Restitution, 6th edn, pp 3, 17, 18 paras 1-002, 1-016, 1-018
Lindley & Banks on Partnership, 16th edn, pp 258-259, 329-330, paras 12-30, 13-24

For the appellant - M Menon; M/s Jaafar & Menon
For the 2nd & 3rd respondents - Zainur Zakaria; M/s Abdul Aziz Rahim & Co
For the 4th respondent - Indran Guru; M/s Krishna Dallumah, Manian & Indran

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-698-1999]

Reported by Amutha Suppayah

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal by the appellant bank against the decision of the High Court of Kuala Lumpur given on 11 November 2005 dismissing the appellant's claim against the second, third and fourth respondents with costs.

[2] In the High Court proceedings, the appellant was the plaintiff, whilst the first, second, third and fourth respondents were the first, second, third and fourth defendants, respectively.

[3] On 25 August 2010 this court, having heard submissions, unanimously allowed the appeal with costs.

[4] In my judgment, the learned High Court Judge had erred when he dismissed the appellant's/plaintiff's claim against the second, third and fourth respondents/defendants.

[5] I shall now give my grounds. A

[6] In writing this judgment, I have had the benefit of reading the draft judgment of my learned colleague, Zaharah Ibrahim JCA.

[7] In this appeal, although the first defendant in the court below, Nordin Hamid, is cited as the first respondent, however, the material respondents in this appeal are the second, third and fourth respondents (Kenneth Gomes, Suhaimi Baharudin and Patrick Lai Chee Keong). The High Court had dismissed the appellant's claim against the second, third and fourth respondents. B C

[8] Apparently, the appellant/plaintiff had obtained a 'default judgment' against the first respondent/first defendant, but there is no appeal to this court by the first respondent in respect of that 'default judgment'. But I shall be alluding to this 'default judgment' later in this judgment, as that 'default judgment' appears to me to be an irregular judgment. D

[9] All the four respondents were advocates and solicitors, and at the material time were practising as partners of a legal firm, a partnership, known as Messrs. Nordin Hamid & Co. ('the legal firm'). The appellant bank was their client. E

[10] The appellant had engaged the legal firm to deal with three foreclosure proceedings in respect of three loan accounts. The accounts were that of: F

(1) Faridah binti Mohd Hashim;

(2) Datuk (Dr.) Ariffin bin Ngah Marzuki; and

(3) Nik Ahmad bin Nik Abdullah. G

[11] The above account holders had defaulted in the repayments of their respective loans.

[12] As instructed by the appellant (the lender bank), the legal firm duly commenced foreclosure proceedings against the aforesaid account holders at the High Court of Kuala Lumpur. The property of Faridah was sold by the High Court on 24 October 1995 for RM82,300. The property of Datuk (Dr.) Ariffin was sold by the High Court on 2 October 1995 for RM765,000. And the property of Nik Ahmad was sold by the District Land Administrator on 21 March 1995 for RM238,000. H I

[13] The High Court/District Land Administrator duly paid the net proceeds of the auction sales to the legal firm on the following dates:

Account	Date of payment
Account of Faridah	7 February1996
Account of Dr. Ariffin	26 February1996
Account of Nik Ahmad	23 May1996

[14] As the net proceeds of the auction sales belong to the appellant, the legal firm was under a legal obligation to remit the same to the appellant.

[15] However, the net proceeds of the auction sales were not remitted to the appellant.

[16] In respect of the account of Faridah, the legal firm remitted to the appellant the net sum of RM79,459.50 only on 23 December 1997, meaning that there was a delay of almost two years to make the remittance (time calculated with effect from 7 February 1996). The appellant claims that this delay in remitting the net proceeds of the auction sales had deprived it of the interest that it could have enjoyed for the period from the date the payment was made by the High Court to the legal firm till the date the net sum was remitted by the legal firm to the appellant. Therefore, in respect of this particular account, the appellant is claiming for the interest sum, a sum of RM11,016.98.

[17] With respect to the account of Dr. Ariffin, the net proceeds of RM747,850 from the auction sales which the legal firm received from the High Court was never remitted at all to the appellant. The appellant, therefore, is claiming from the legal firm this sum plus interest in the sum of RM218,646.87.

[18] Similarly, for the account of Nik Ahmad, the net proceeds of RM236,525.00 from the auction sales, which the firm received from the District Land Administrator, was never remitted at all to the appellant. Likewise here, the appellant is claiming from the legal firm this amount, together with interest in the sum of RM64,382.61.

[19] A notice of demand was issued by the appellant's Head of Legal Unit to the legal firm on 14 January 1998 for the net proceeds of the auction sales in respect of the accounts of Dr. Ariffin and Nik Ahmad, but the legal firm failed to remit the net proceeds to the appellant.

[20] On 28 June 1999, the appellant's solicitors, Messrs Jaffar & Menon, issued a letter of demand to all the four respondents as the partners of the legal firm for the remittance of the net proceeds of the auction sales and interests in respect of the accounts of Dr. Ariffin and Nik Ahmad and the interest sum in respect of the account of Faridah.

[21] All the four respondents failed to comply with the demand. The appellant commenced an action against them as the partners of the legal firm, to recover the net proceeds of the auction sales and interest.

[22] The basis of the appellant's claim is the common law of restitution. It is a claim for money had and received based on the principle of unjust enrichment. The classic work, *Goff & Jones on The Law of Restitution* (6th edn.), has this to say on the common law claim for money had and received (p. 3, para 1-002):

> **Common law restitutionary claims based on unjust enrichment**
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> We understand quasi-contract to be that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebat claims. The action for money had and received lay to recover money which the plaintiff had paid to the defendant, on the ground that it had been paid under a mistake or compulsion, or for a consideration which had wholly failed. By this action the plaintiff could also recover money which the defendant had received from a third party, as when he was accountable or had attorned to the plaintiff in respect of the money, or the money formed part of the fruits of an office of the plaintiff which the defendant had usurped. The action also lay to recover money which the defendant had acquired from the plaintiff by a tortuous act: and, in the rare cases, where the defendant had received money which the plaintiff could identify as his own at the time of receipt and for which the defendant had not given consideration, the plaintiff could assert his claim by means of this action.

[23] The learned authors then state the principle of unjust enrichment as follows (p. 17 para 1-016):

> As might be expected a close study of the English decisions, and those of other common law jurisdictions, reveal a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff's expense. Thirdly, it would be unjust to allow the defendant to detain that benefit.

[24] Having stated the principle, the learned authors go on to elaborate (at p. 18 para 1-018):

> The most common example of a positive benefit is money, which has the peculiar character of a universal medium of exchange.

[25] In my judgment, on the facts of the present case, the appellant must succeed in its claim for restitution against the second, third and fourth respondents based on the claim for money had and received and the principle of unjust enrichment, as well as based on s. 11 of the Partnership Act 1961. It is not disputed that the legal firm had received the net proceeds of the auction sales from the High Court and the District Land Administrator and that the monies were meant for the chargee bank, that is, the appellant. And it is not disputed that the legal firm had failed to remit the monies to the appellant; or, in the case of one of the accounts (Faridah's account), had grossly delayed in remitting the same to the appellant. It is unlawful for the legal firm to withhold the monies or to delay in remitting the same to the appellant. The net proceeds of the auction sales are not the legal firm's monies: the monies belong to the appellant bank. The legal firm is merely an agent of the appellant, and is holding the monies on behalf of the appellant as constructive trustee. The legal firm knew that the monies must be remitted to the appellant without undue delay.

[26] Section 11 of the Partnership Act 1961 provides:

> **11. Liability of partners**
>
> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner, and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

[27] Section 11 above uses the word 'firm'. What is a 'firm'? Section 6 of the Partnership Act provides:

> **6. Meaning of firm and firm-name**
>
> Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively as a firm, and the name under which their business is carried on is called the firm-name.

[28] Based on these provisions of the Act, since the legal obligation to make restitution is that of the legal firm, therefore every partner of the firm is jointly liable with the other partners to make restitution.

[29] It is submitted by the learned counsel for the second and third respondents that the appellant in its statement of claim has not pleaded its cause of action based on a claim for money had and received. However, learned counsel does not go on to explain in what way that the appellant has failed to plead such a claim. With respect, this contention is rather perplexing, unfair and devoid of any merit; for, to my mind, it is very clear from the averments in the statement of claim that the claim is for:

(a) money had and received;

(b) breach of trust; and

(c) liability of partners of a partnership under the Partnership Act 1961.

[30] In the entire statement of claim consisting of 29 paragraphs, only one paragraph deals with the allegation of breach of trust, and that is para. 26. However, in the High Court proceedings – and in this court as well – the plaintiff abandoned its claim for breach of trust, and only confined its claim for money had and received and on the liability of partners under the Partnership Act.

[31] That the appellant had in the High Court proceedings abandoned its claim for breach of trust is clear from the written submission of the appellant's counsel before the High Court. That written submission states:

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2. Plaintiff's Claim

2.1 The Plaintiff's claim is laid out in paragraph 1 - 25 of the Statement of claim (SOC) (Page 6-15 Ikatan Pliding Terkini) and not as stated collectively by the 2nd, 3rd and 4th Defendants as misappropriation of monies/breach of trust.

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2.2 Primarily it is a claim for monies received for and/or on behalf of the Plaintiff and the failure, omission and/or neglect by the Defendants' firm to return the auction proceeds.

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[32] Significantly, the fact that the appellant had in the High Court proceedings abandoned its claim for breach of trust is acknowledged by the learned counsel for the second and third respondents in his submission before this court (Court of Appeal). Such acknowledgement can be found at paras 4.1.2 and 4.1.5 of the written submission of the learned counsel for the second and

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third respondents (before this court) wherein it is submitted:

4.1.2 Further, the Appellant's opening submission in the High Court was:

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(2) **Plaintiff's Claim**

2.1 The Plaintiff's claim is laid out in paragraph 1 - 25 of the Statement of claim (SOC) (Page 6-15 Ikatan Pliding Terkini) and not as stated collectively by the 2nd, 3rd and 4th Defendants as misappropriation of

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monies/breach of trust.

2.2 Primarily it is a claim for monies received for and/or on behalf of the Plaintiff and the failure, omission and/or neglect by the Defendants' firm to return the auction proceeds.

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4.1.5 It is our submission that the Appellant has abandoned his cause of action for breach of trust and is precluded from re-opening and reconsidering the matter. This is not an

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omission but a deliberate case of abandoning his cause of action.

[33] Yet, rather perplexingly, the learned High Court Judge, in his grounds of judgment, ignored this important fact of the abandonment of this issue of breach of trust and still laboured on

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that issue in his grounds. For he wrote (in his grounds of judgment):

Analysis

The first issue taken by the 2nd to 4th defendants is that the cause of action of the plaintiff against the defendant is for breach of trust. As such, legal principles relating to this cause of action must apply.

[34] And, although the appellant's only claim (besides the claim on the liability of partners of a partnership) is for money had and received (after having abandoned the claim on breach of trust), and that, as I have just pointed out, the learned counsel for the appellant in the High Court proceedings, in his written submission, had taken pains to state this fact (that his claim is primarily for money had and received), yet – and again, to my mind, rather perplexingly – the learned High Court Judge, in his grounds of judgment, appears to have ignored this particular cause of action (for money had and received).

[35] In his submission before us, the learned counsel for the second and third respondents also urges this court (Court of Appeal) to uphold the finding of the learned High Court Judge that there was a misappropriation of the monies by the first respondent, and by reason of this fact the other partners are not liable, citing s. 15 of the Partnership Act.

[36] With respect, this argument must be rejected. In my judgment, the learned judge had not only erred when he made such a finding: he had, unintentionally, thrown in a red herring into the judgment by bringing in the issue of breach of trust. First, as I have said, the appellant at the High Court had abandoned the claim against all four respondents for breach of trust, and was proceeding only on the claim for money had and received (besides the partnership issue). Secondly, and more significantly, the respondents, in their statements of defence (the first, second and third defendants had filed a joint statement of defence), have denied committing any breach of trust by any one of them; and, there was never any allegation by the second, third and fourth respondents in their statements of defence that the first respondent had committed a breach of trust in relation to the net proceeds of the auction sales. Therefore, breach of trust was never an issue at all before the High Court. Indeed, before this court (Court of Appeal) the second and third respondents, in the written submission of their learned counsel, have taken the position:

A 4.1.7 The 2nd and 3rd Respondents have stated very clearly in their Witness Statements that they were not aware of **when** the monies were paid into the firm, or **how** the monies were misappropriated by the 1st Respondent.

B **[37]** With respect, the learned High Court Judge should have confined his findings to the pleadings.

[38] As for the fourth respondent, Patrick Lai, it is not disputed that he only became a partner of the legal firm on 1 June 1996. The fourth respondent contends that, taking this date of 1 June C 1996, it would mean that he was not yet a partner in the legal firm at the material times and therefore was not liable to the appellant for the amounts claimed. He submitted that the material times were 7 February 1996, 26 February 1996 and 23 May 1996, as these are the dates when the legal firm received the net D proceeds of the auction sales from the High Court/District Land Administrator. The learned counsel for the fourth respondent refers to *Lindley & Banks on Partnership* (16th edn.) wherein it is stated (at p. 258-259 para 12-30):

E Incoming and outgoing partners

An incoming partner is not affected with notice of what occurred before he joined the firm and an outgoing partner is not in general affected with notice of what has occurred since he left the firm, provided that there is no continuing agency between him and the F remaining partners.

[39] The learned counsel also refers to the same authority under the subheading 'Incoming partners' wherein the learned authors wrote (at pp. 329-330, para 13-24):

G Lord Lindley put it in this way:

> … the firm is not distinguishable from the persons from time to time composing it; and when a new member is admitted he becomes one of the firm for the future, but not H as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorized what may have been done prior to his admission. It may perhaps be said that the entry of the new partner amounts to a ratification by him of what his now partners may have done before he joined them. But it must be I borne in mind that no person can be rendered liable for the

> act of another on the ground that he has ratified, confirmed, or adopted it, unless, at the time the act was done, it was done professedly on his behalf.
>
> To this might be appended the observation that the admission of an additional partner will, as a matter of law, constitute a new partnership and it should therefore come as no surprise that special circumstances must be shown before that new firm will be treated as having taken over the debts and obligations of the old.

[40] With respect, I am not persuaded by this argument. It is true that when the legal firm received the monies from the High Court and the District Land Administrator the fourth respondent then was not yet a partner of the firm. However, it is significant to note that, even after the fourth respondent had joined the legal firm on 1 June 1996, the monies were still not handed over to the rightful owner, the appellant; and the monies (except in respect of the net proceeds of the account of Faridah which were remitted to the appellant very late on 23 December 1997) were still not remitted to the appellant even after two notices of demand were issued, namely (1) by the appellant's Head of Legal Unit on 14 January 1998, and (2) by the appellant's solicitors on 28 June 1999. In my judgment, in the circumstances of the case, the fourth respondent is still liable in respect of the firm's obligation to make restitution to the appellant by reason of s. 11 of the Partnership Act. The legal obligation of the legal firm to make restitution did not cease at the time the fourth respondent joined the legal firm (1 June 1996). So long as the monies were not remitted to the appellant, meaning that so long as the legal obligation to make restitution in respect of the net proceeds was not carried out by the legal firm, that legal obligation persists; and that legal obligation was still continuing at the time the fourth respondent joined the firm on 1 June 1996, and even thereafter. In my judgment, the phrase 'obligations of the firm incurred while he is a partner' in s. 11 of the Partnership Act ought to be interpreted to include this continuing obligation. In interpreting s. 11, it must be borne in mind that the legal firm benefitted by retaining the appellant's monies. The legal firm was a partnership. The fourth respondent was a partner in that partnership with effect from 1 June 1996. Thus, he too, as a partner of the firm (the partnership), benefitted from the unlawful retention of the

monies from the day he joined the partnership. Therefore, it would not be justified if s. 11 were to be narrowly interpreted in a manner that would absolve the fourth respondent from the firm's legal obligation to make restitution in respect of those monies.

[41] Finally, there is one disquieting observation that I make of the proceedings in the High Court below. The notes of the proceedings before the High Court show that on the first day of the trial, at the commencement of the hearing, the first respondent/first defendant, Nordin Hamid, was absent. The appellant's/plaintiff's counsel applied for a 'default judgment' against him by reason of his absence.

[42] Unfortunately, the court granted the application and a 'default judgment' was entered against the first respondent. Now, with respect, what learned counsel and learned High Court Judge did was highly irregular and legally wrong. As a matter of procedural law, even though the first respondent/1st defendant was absent, the court should have proceeded with the trial, and the court could only give judgment against the first respondent at the conclusion of the trial; and that judgment would have to be given on the merit of the plaintiff's case. There is no such thing as a 'default judgment' by reason of the absence of the first respondent (see O. 33 of the Rules of the High Court 1980). It would have been a different matter altogether if it was the plaintiff who was absent on the first day of the trial. In such a case, it would have been in order and lawful for the court to dismiss the plaintiff's claim, if the court was satisfied that there was no valid reason for the absence.

[Appeal allowed with costs]

Zaharah Ibrahim JCA:

[43] This was an appeal by the appellant against the decision of the High Court in Malaya at Kuala Lumpur handed down on 11 November 2005 dismissing the appellant's claim against the second, third and fourth respondents with costs.

[44] After scrutinising the record of appeal, and reading and hearing the submissions of the appellant and respondents, we allowed the appeal with costs, with costs being fixed at RM30,000 here and RM10,000 for the court below.

Background Facts

[45] The four defendants in the court below were advocates and solicitors and practised as partners under the style of Tetuan Nordin Hamid & Co. ("the firm"). The appellant was their client.

[46] The appellant engaged the Firm to deal with 3 foreclosure proceedings in respect of three accounts. The three accounts were referred to as "Akaun Faridah". "Akaun Dr. Ariffin" and "Akaun Nik Ahmad", respectively.

[47] Public auctions were successfully completed in respect of the foreclosed properties. The Appellant claimed that the nett proceeds of the sale at the auctions were paid over to the Firm on the following dates:

Account	Date of payment
Akaun Faridah	7 February 1996
Akaun Dr. Ariffin	26 February 1996
Akaun Nik Ahmad	23 May 1996

[48] The Firm paid over to the appellant the proceeds from the sale at the auction in respect of Akaun Faridah on 23 December 1997, almost two years later. The appellant claimed that the delay in remitting the proceeds of the sale had deprived it of the interest which it could have enjoyed for the period from the date the payment was received to the date the payment was remitted to the appellant. The appellant's claim in respect of Akaun Faridah was for the amount of such interest.

[49] In relation to Akaun Dr. Ariffin and Akaun Nik Ahmad, the appellant claimed that the amount received by the Firm as proceeds from the respective sale by auction was not remitted at all to the appellant. The appellant therefore claimed for the payment to it of those amounts as well as interest thereon.

Defence

[50] The 4th respondent in his defence stated that he was not a partner in the firm at the material time and therefore was not liable to the appellant for the amounts claimed.

[51] The 2nd and 3rd respondents claimed that the delay in remitting the proceeds of sale in respect of Akaun Faridah was due to the dispute between the appellant and the Firm as to the legal fees of RM31,129.40 claimed by the firm, which is still not paid to date and for which they claimed a set off. They claimed that the proceeds of sale in respect of Akaun Dr. Ariffin and Akaun Nik Ahmad were retained by way of solicitors' lien to secure the payment of the disputed fees.

[52] Additionally, the 2nd, 3rd and 4th respondents averred that disciplinary proceedings had been conducted by the disciplinary board under the Legal Profession Act 1976 against them for breach of trust as a result of the appellant's complaint. They state that in those proceedings, the appellant's counsel had made submissions in which it was conceded that the 2nd, 3rd and 4th respondents did not commit breach of trust. That admission, they say, was binding upon the appellant, who was therefore estopped from proceeding with the claim for breach of trust. Further, there was also an admission by the 1st respondent (Nordin Hamid) during the proceedings that he alone was responsible for the breach of trust.

Decision Of High Court

[53] The learned High Court Judge in his decision found that the appellant did not sue the respondents on the basis of a retainer. Had it done so, the learned High Court Judge was of the view that the 2nd to the 4th respondents would have no case to answer. Having made that finding, the learned High Court Judge focused solely on the issue of breach of trust, and in particular on the admission made during the course of the disciplinary proceedings. He then found that the 2nd to 4th respondents were not liable as breach of trust was committed by the 1st respondent alone and they did not participate in nor had any knowledge of the breach of trust until long after the event. He therefore dismissed the appellant's claim.

Decision

Retainer

[54] The learned High Court Judge erred in his finding that the claim was not based on retainer and was solely based on breach of trust.

[55] Paragraphs 6 and 7 of the statement of claim clearly showed that the basis for the claim was the fact that the appellant had retained the firm to deal with the foreclosure proceedings.

[56] Interestingly, in the joint amended statement of defence of the 1st, 2nd and 3rd respondents, they not only admitted paras 6 and 7 of the statement of claim, but went on further to state that the firm had in fact been providing legal service for miscellaneous matters orally and in writing since 1982.

[57] The money was received by the firm upon the successful sale of the properties which were the subject-matter of the auctions. The receipt of the money was not denied by the respondents. In those circumstances, by virtue of s. 13 of the Partnership Act 1961, the firm was liable to make good the appellant's loss. Consequently, by virtue of s. 14 of the Partnership Act 1961 all the partners, including the 2nd to the 4th respondents, were liable jointly and severally to make good such loss.

[58] The position of the 4th respondent was addressed by the learned High Court Judge, who found that at the time the first written demand was made by the appellant, the 4th respondent was already a partner in the Firm. That first written demand gave rise to the debt claimed by the appellant. The 4th appellant was therefore caught by s. 11 of the Partnership Act 1961, which provides, *inter alia*, that "Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner".

Breach Of Trust

[59] On the issue of breach of trust, the learned High Court Judge relied on s. 15 of the Partnership Act 1961 and concluded that the 2nd to 4th respondents were "saved" by para. (a) of the proviso to that section.

[60] Section 15 reads as follows:

> **Improper employment of trust property for partnership purposes**
>
> 15. If a partner, being a trustee, improperly employs trust property for the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:

A Provided as follows:

(a) this section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

B (b) nothing in this section shall prevent trust money from being followed and recovered from the firm, if still in its possession or under its control.

[61] In other words, s. 15 deals with the situation where one C partner is trustee of trust property, and he utilises that trust property in the business or on the account of the partnership business. In such a situation, the other partners are not liable to the beneficiaries of the trust unless they have notice of the breach of trust.

D **[62]** In this case, the money was not entrusted to any particular partner as trustee. It was received by the firm. It is in the context of receiving the money and holding the money on behalf of the appellant with an obligation to hand over the money to the appellant that the "trust" arose. In fact, in para. 16 of their E amended statement of defence, the 2nd and 3rd respondents admit that their role was as trustees ("memegang peranan sebagai pemegang amanah").

[63] As the money was received by the firm, the misapplication F of the money by the 1st respondent cannot absolve the other partners from the liability to make good the loss to the appellant. This is clear from ss. 13 and 14 of the Partnership Act 1961:

Misapplication of money or property received for or in custody of firm

G

13. In the following cases, namely:

(a) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and

H

(b) where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,

I the firm is liable to make good the loss.

Liability for wrongs joint and several

14. Every partner is liable jointly with co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 12 or 13.

[64] The 2nd to the 4th respondents are therefore jointly and severally liable to return the money received by the firm together with interest thereon as claimed by the appellant in para. 29(i) to (v) of the appellant's statement of claim.

[65] My learned brother Tengku Baharudin Shah, JCA, has read these grounds in draft and expressed his agreement with them.